Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARCUS B. FELDMAN,

Petitioner,

v.

ART BAHN, EDWIN LAWRENCE, and HARLAN BENGSTON, Faculty Members at Southern Illinois University at Edwardsville ("SIUE") and Members of the Panel Deciding Plaintiff's Grievance, in their official and individual capacities; CHUNG-WU HO, Chair of the Department of Mathematics and Statistics and EARL LAZERSON, President, in their official and individual capacities; DAVID WERNER, Provost and Vice President of Academic Affairs; LAWRENCE BROWN, Chancellor of Southern Illinois University, and THE MEMBERS OF THE SOUTHERN ILLINOIS UNIVERSITY BOARD OF TRUSTEES, in their official capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN O. HARRIS
(Counsel of Record)
TIMOTHY L. STALNAKER
HARRIS, DOWELL, FISHER, HARRIS & STALNAKER
15400 South Outer Forty, Suite 202
Chesterfield, Missouri 63017
(314) 532-0300

Attorneys for Petitioner, Marcus B. Feldman

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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QUESTIONS PRESENTED

1. Whether, when public university officials terminate a faculty member in retaliation for non-disruptively expressing a good faith concern about a colleague's claims regarding research, those officials are entitled to qualified immunity because the inherent complexity of the Free Speech balancing process precludes the existence of a clearly established constitutional right.

2. Whether, on an interlocutory appeal from the denial of a motion to dismiss, a Court of Appeals can presume facts on behalf of the defendants that are contrary to the plead facts because the defendants are university officials or faculty.

LIST OF PARTIES

Plaintiff Marcus B. Feldman filed suit against Art Bahn, Edwin Lawrence, Harlan Bengston, Chung-Wu Ho, and Earl Lazerson in their official and individual capacities and against David Werner, Earl Lazerson, Lawrence Brown, and "the Members of the Southern Illinois University Board of Trustees" in their official capacities.

The Amended Complaint does not identify, by name, the Members of the Board.

Petitioner is only seeking review of that portion of the judgement of the Seventh Circuit directed to the defendants sued in their individual capacities.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Marcus B. Feldman respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on December 29, 1993. The Seventh Circuit denied Feldman's Petition for Rehearing on March 9, 1994.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Seventh Circuit is reported at 12 F.3d 730. It is reprinted as Appendix A hereto. The Order by which the Seventh Circuit denied the Petition for Rehearing is not reported. It is reprinted as Appendix C.

The Order and Amended Order of the United States District Court for the Southern District of Illinois (Gilbert, J.) are not reported. They are reprinted as Appendix B.

JURISDICTION

1. The judgment of the U.S. Court of Appeals for the Seventh Circuit sought to be reviewed was entered December 29, 1993.

2. The Seventh Circuit denied Petitioner Feldman's Petition for Rehearing on March 9, 1994.

Petitioner Feldman seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. 1. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. 14. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement.

> Section 1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

From 1986 to 1990 Petitioner Feldman held a tenure-track position in the Department of Mathematics and Statistics at Southern Illinois University at Edwardsville (Amended Complaint ¶3).

In the spring of 1989, Dr. Feldman, acting in good faith and under SIUE's Policy on Academic Integrity, brought to the attention of Chung-Wu Ho, Chair of his Department, his concerns about a colleague's research claims. Feldman believed her upcoming tenure vote made it incumbent on him to do so (Amended Complaint ¶15).

Before Feldman raised his concerns, Ho had told Feldman that he saw no reason why Feldman's contract would not be normally

continued until a tenure vote, recommended Feldman's appointment to important positions in the Department and favorably evaluated his research and teaching (Amended Complaint ¶16).

Shortly after Plaintiff raised his concerns, Ho told the colleague whose research claims Feldman had questioned that he, Ho, would retaliate against anyone who went against her tenure. Ho then began a course of conduct which resulted in Feldman's termination (Amended Complaint ¶¶17-21).

Feldman filed a grievance under the University's grievance procedure which was heard and denied by Defendants Bahn, Lawrence and Bengston. At the beginning of the hearing on his grievance, Feldman alerted them that one of the issues before them was whether his termination violated his constitutionally protected right to free speech. Nonetheless, they faulted him for expressing concerns about his colleague, calling Feldman's actions "quixotic" and "digging dirt" (Amended Complaint ¶¶27-29). The Chair of the Grievance Panel, Defendant Bahn, told Feldman that he knew that what Ho had done was unethical but that the Panel would find against Feldman anyway. Bahn, Lawrence and Bengston then submitted an intentionally distorted report on the grievance to the President of the University, Defendant Lazerson (Amended Complaint ¶31).

Defendant Lazerson asked for an extension of time to carefully review the record and accepted the recommendation of the grievance panel to deny Feldman's grievance (Amended Complaint ¶32).

The grievance procedure also permitted appeal to the Members of the Board of Trustees, which Feldman did. They denied his appeal (Amended Complaint ¶34). They are named as official capacity defendants only.

Defendants filed no answer, but moved to dismiss on several grounds, including qualified immunity. The District Court

denied the motion and the defendants filed an interlocutory appeal.

The Seventh Circuit (Judges Easterbrook and Wood, with Judge Flaum dissenting) acknowledged that it must assume, as pled, that Ho recommended that Feldman's employment be terminated because of his speech rather than because of his scholarship or teaching (Appendix, p.2). But then the Court asserted (and later, without support in the record, seemed to accept as facts in this case) that:

> Teachers . . . are eager to protect both public and private interests in freedom to stake out controversial positions . . . and are eager to protect both public and private interests in the ability to judge the speech of others and react adversely to some (Appendix, p.4).

With respect to the substance and effect of Plaintiff's speech, the Court asserted — and again seemed to accept as the facts in this case, though contrary to the record — that:

> ...an unsupported charge of plagiarism reflects poorly on the accuser; the first amendment does not ensure that a faculty member whose assessment of a colleague's work reveals bad judgment will escape the consequences of that revelation (Appendix, p. 5).

The Seventh Circuit reversed the District Court as to the five defendants sued in their individual capacities and dismissed them. To reach this result, the majority relied upon *a priori* assumptions about how universities function. They reasoned and held that:

> On receiving a charge of intellectual dishonesty, a university should investigate. Interests weigh on the side of the speaker, on the side of the target, and on the side of the educational mission. If the charge is correct, the plagiarist should be disciplined; if the charge is unfounded, the

accuser should be disciplined; if there is some basis for the charge, but the university believes that the accusation is unproven, then no one should be disciplined — for a university does not wish to discourage candid discourse about the quality of work being performed by the faculty. Which of these three outcomes is appropriate depends not on whether plagiarism is a "matter of public concern," *Pickering*, 391 U.S. at 568, but on the truth of the accusation and the care the accuser took before making it. There are no categorical answer, only a process of investigation and deliberation leading to a disposition one case at a time. This suggests the lack of any clear constitutional right. As we have held repeatedly, the complexity of *Pickering*'s balancing approach makes damages too crude an instrument. As a result, "qualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required." *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986). (Appendix, p. 6)

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S HOLDING THAT PUBLIC UNIVERSITY OFFICIALS CANNOT BE HELD LIABLE FOR TERMINATING A FACULTY MEMBER SOLELY BECAUSE OF HIS GOOD FAITH QUESTIONING OF THE LEGITIMACY OF A COLLEAGUE'S RESEARCH CLAIMS RAISES IMPORTANT LEGAL QUESTIONS ABOUT THE DEGREE OF AUTONOMY PUBLIC UNIVERSITY OFFICIALS SHOULD HAVE. PROMINENT CONTEMPORARY CONTROVERSIES DEMONSTRATE THE SIGNIFICANCE OF THESE LEGAL QUESTIONS.

A. Questions About Research And How Universities Handle These Questions Are Important National Issues.

A quick review of the *New York Times* or the *Chicago Tribune* or the shelves of bookstores reveal the national importance of the issue of integrity in academics and research. The Gallo case (a dispute over the discovery of the AIDS virus) and the Baltimore case (where the Nobel Prize winning biologist Dr. David Baltimore intimidated a junior scientist whistleblower and it took the U. S. Congress to vindicate her) and the recent University of Pittsburgh - National Institutes of Health case (concerning fraudulent breast cancer data) amply demonstrate the complicated issues and human behavior involved in these cases and the need for the courts to decide how to handle the legal questions involved.

There is already a public debate over the issue of integrity in research and education. (See, for example the books, *Stealing Into Print - Fraud, Plagiarism, and Misconduct in Scientific Publishing* by Marcel C. LaFollette, University of California Press (1992), *Impure Science -Fraud, Compromise, and Political Influence in Scientific Research* by Robert Bell, John Wiley

& Sons, Inc. (1992), and *Impostors in the Temple - American Intellectuals Are Destroying Our Universities and Cheating Our Students of Their Future* by Martin Anderson, Simon & Schuster (1992).) This debate may well stay abstract, though, as long as academics and researchers who care about the issues and are aware of specific cases of egregious incidents of unethical behavior remain in limbo as to the amount of protection that they will get from the courts when things go awry for them, as things almost surely will. LaFollette, in her book about scientific misconduct, quotes a congressional staff member who investigated scientific fraud and stated that:

> Every one of the cases we looked at, there was hardly a single person . . . that ever raised a question and survived. *Stealing Into Print*, p. 148.

In sum, the determination of the constitutional protection of whistleblowers, is a pressing national issue because: (i) it is important for the public to know when medical and other research at public universities is not handled honestly or is fraudulent, (ii) in the debate over integrity in science and education, it is important to understand the facts of cases where there are claims of a lack of integrity in order to make informed policy decisions, and (iii) whistleblowers are usually retaliated against.

B. The Court Should Address Whether The Autonomy And Impunity Which The Seventh Circuit's Decision Effectively Grants Public University Officials Is Appropriate.

This Court should grant certiorari to clarify whether, when officials at public universities have terminated faculty for speech, these officials mustpresent evidence that they actually *did* balance competing interests before they can be granted qualified immunity.

If officials at public universities do not risk personal liability when they terminate faculty solely for raising reasonable, good

faith questions about the research claims of their colleagues, then those officials will be much more likely to punish academic whistleblowers. It will then be much more likely that false claims of scientific research will go unquestioned; few people will want to raise even legitimate questions if they know that, if they are terminated, their only remedy under federal law is reinstatement. As this Court noted in *Harlow v. Fitzgerald*, when government officials abuse their offices, an "action for damages may offer the only realistic avenue for vindication of constitutional guarantees." 457 US at 814.

At the same time that whistleblowers need protection, accused researchers also need protection against baseless or bad faith challenges to their research. It is an important national question whether impunity for public university officials who terminate whistleblowers is an appropriate protection for the accused researchers; and, whether, in the light of recent important questions about university research, funding and education, the autonomy of public universities should be enlarged to the degree to which the Seventh Circuit's ruling has done in this case.

II. THE SEVENTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S OPINION IN *ANDERSON v. CREIGHTON* BY ESTABLISHING A RULE GRANTING QUALIFIED IMMUNITY TO UNIVERSITY OFFICIALS WITHOUT AN OBJECTIVE FACT-SPECIFIC ANALYSIS.

In deciding whether or not to grant qualified immunity in this case, the Seventh Circuit reasoned from a *premise* (Free Speech balancing is a complicated process which university officials always carry out) to the *conclusion* that, because Free Speech issues inherently involve balancing, the law cannot be clearly established and, hence, university officials should be granted qualified immunity. The Court did this apparently without assigning weight to the specific facts before it that contradicted the *a priori* premise.

While the premise arguably could be defended as a reasonable proposition in a philosophical debate, the Seventh Circuit's reliance upon it, instead of the record, violates the mandate of this Court in *Anderson v. Creighton* that determinations as to whether defendants should be granted qualified immunity must be fact specific. 483 US at 641.

This Court in *Anderson* also refused to "Balkanize the rule of qualified immunity by carving exceptions." 483 US at 645. The new rule the Seventh Circuit established in this case grants university officials immunity without regard for the specific facts — an exception to the general practice. Instead, the Seventh Circuit granted immunity on the presumption that university officials, as a class, will appropriately balance competing interests in cases such as this one.

Even the assertion by the Seventh Circuit that balancing is too complex to permit an award of damages against individuals (even assuming there has been balancing) conflicts with the *Anderson v. Creighton*'s fact-specific requirement. Surely, there will be circumstances where the questions raised about research are of paramount importance to the public and where those questions are only minimally disruptive to the academic institution. On the other hand, there will be other situations where the questions raised are trivial but highly disruptive. The cases at both ends of the spectrum should not be treated the same, with immunity freely granted, simply because the balancing inherent in constitutional rights is complex.

Finally, the incidents cited above involving Dr. David Baltimore and the University of Pittsburgh and the National Institutes of Health demonstrate that even the *a priori* facts that the Seventh Circuit relied on to assume there was balancing in Feldman's case are contrary at times to what happens in the real world of academics.

This Court should grant certiorari to clarify whether the difficult but important fact-specific analysis required by *Ander-*

son can be avoided by relying on an *a priori* assumption that university officials will balance when there are speech issues and that, when there is balancing inherent in the constitutional right, case-specific facts aren't necessary.

III. THE SEVENTH CIRCUIT'S NEW RULE FREELY GRANTING QUALIFIED IMMUNITY TO UNIVERSITY OFFICIALS CONFLICTS IN PRINCIPLE WITH TWENTY-FIVE YEARS OF THIS COURT'S DECISIONS HERALDING AND PROTECTING THE FREE EXCHANGE OF IDEAS AT ACADEMIC INSTITUTIONS.

In *Pickering v. Board of Education*, this Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance could not be the basis for his dismissal from public employment." 391 US at 574 (1988).

In reaching this decision, Justice Marshall announced:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. 391 US at 572.

Perry v. Sunderman, 408 US 593 (1972) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 US 254 (1977) extended this protection to non-tenured university faculty.

Givhan v. Western Line Consolidated School District, 439 US 410 (1979) extended this protection to private expression of views.

In *Keyshian v. Board of Regents of the State of New York*, 385 US 589 (1967), this Court, on petition by university professors,

struck down a law making treasonous or seditious words grounds for dismissal from public employment. Justice Brennan wrote that the vigilant protection of constitutional freedoms is nowhere more vital than in the Community of American schools.

These cases addressed the scope of the right to free speech, not qualified immunity. But for the law to proclaim a right, while permitting those who infringe it to act with impunity, renders the right virtually meaningless. Because the Seventh Circuit's approach to qualified immunity does this where the right is free speech and the defendants are university officials, this Court should determine whether the Seventh Circuit approach should be accepted.

IV. THE SEVENTH CIRCUIT'S SWEEPING GRANT OF QUALIFIED IMMUNITY TO UNIVERSITY OFFICIALS BASED ON THE INHERENT COMPLEXITY OF THE BALANCING PROCESS CONFLICTS WITH THE SECOND, TENTH AND ELEVENTH CIRCUITS WHICH HAVE APPLIED *PICKERING* AND *ANDERSON* TO UNIVERSITY OFFICIALS IN THE SAME MANNER AS TO OTHER PUBLIC OFFICIALS.

The decision below creates a clear conflict among the circuits on the tests to be applied in granting immunity to university officials.

In *Dube v. State of New York*, 900 F.2d 587 (1990), the Second Circuit denied qualified immunity to university officials who denied a professor tenure allegedly "based on his discussion of controversial topics in the classroom" notwithstanding its acknowledgment "that courts should accord deference to academic decisions." 900 F.2d at 589 and 598. The record showed that Dube's publications were below levels considered adequate at SUNY/Stoneybrook but the Second Circuit still denied the defendants qualified immunity to Dube's §1983 claim because

the Court *also* found "evidence from which a jury could find that defendants denied tenure and promotion to [Dube] in response to pressure exerted by government officials and community activists outraged by his teachings." 900 F.2d at 597. Dube had taught that the three forms of racism manifested themselves in Germany's Nazism, South Africa's Apartheid and Israel's Zionism - surely as disruptive an activity as Feldman's questioning his colleague's claims to expertise and publications in an area of mathematics.

Again in *Jeffries v. Harleston*, 9 IER 686, 1994 WL 143448, ____ F.3d ____ (1994), the Second Circuit denied qualified immunity to university officials alleged to have deprived a faculty member of his department chair based on his speech, noting that by the date of their action:

> Both the Supreme Court and the Second Circuit had repeatedly held that absent a disruption of government operations, a public employer may not sanction an employee for speaking on issues of social or political concern. 1994 WL 143448 at 10.

In *Powell v. Gallentine*, 8 IER 951, 992 F.2d 1088 (1993), the Tenth Circuit framed the issue before it:

> Since the law in general [referring to *Pickering*, *Mt. Healthy* and *Connick*] was clearly established at the time of the events in question here, the issue on appeal is whether defendants should reasonably have been on notice that [the plaintiff's] speech in particular was protected and they could not prevail in the *Pickering* balancing of interests.

Rejecting the officials' arguments that the plaintiff's interest in speaking could not outweigh their interest in efficient operations and their belief that the plaintiff's speech was false, the Court denied immunity under the test that:

> To prevail in *Pickering* balancing, Defendants must show evidence of actual disruption of the university's services

> resulting from the speech at issue . . . or that the speech was knowingly or recklessly false. 8 IER at 952.

These cases demonstrate a strong reluctance to grant university officials qualified immunity, precisely the opposite proclivity from the Seventh Circuit's.

Moreover, the Second and Tenth Circuit's view of whether the applicable law was clearly established is at polar extremes to the Seventh Circuit's view.

These recent cases taking such divergent views from the Seventh Circuit's opinion demonstrates the need for this Court to clarify the standards for granting qualified immunity in academic settings.

CONCLUSION

For these various reasons, Petitioner respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

John O. Harris
(Counsel of Record)
Timothy L. Stalnaker
Harris, Dowell, Fisher,
Harris & Stalnaker
15400 South Outer Forty
Suite 202
Chesterfield, Missouri 63017
Telephone: (314) 532-0300

Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-1908

MARCUS B. FELDMAN,
Plaintiff-Appellee,

v.

ART BAHN, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois,
East St. Louis Division.
No. 92-442-JPG—**J. Phil Gilbert,** *Chief Judge.*

ARGUED NOVEMBER 3, 1993—DECIDED DECEMBER 29, 1993

Before WOOD, JR., FLAUM, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* While serving as an assistant professor of mathematics at Southern Illinois University, Marcus B. Feldman accused a colleague of plagiarism. Chung Wu Ho, the chairman of the department, recommended that Feldman's contract not be renewed, and other officials in the University went along; meanwhile the object of Feldman's accusation received tenure. Feldman began this action under 42 U.S.C. §1983 against everyone in sight: Ho, three members of a grievance committee that declined to overrule Ho's recommendation, the provost and president of the University, and the University's Board of Trustees (together with all of the Board's members). Feldman believes that Ho and the other defendants sacked him on account of speech protected by the first and fourteenth amendments to the Constitution. He asked for damages and

reinstatement, with tenure. For current purposes we must assume that Ho made his recommendation because of Feldman's accusation rather than because of Feldman's scholarship and teaching.

All of the defendants asked the district court to terminate the damages portion of the case on the basis of qualified immunity. After entertaining oral argument, the district court denied the motion. Its full explanation is: [T]he Court holds that the Plaintiff's pleadings are sufficient to state a cause of action and these Defendants are not entitled to qualified immunity on the facts pled." The court did not say why, and both parties tell us that the judge was no more forthcoming at the argument (which has not been transcribed). Both the parties and this court are entitled to explanations from district judges—the parties so that they may know how to conduct the remainder of the litigation, and this court so that it may know the basis of the district judge's decision. For an order rejecting a claim of qualified immunity is appealable, *Mitchell v. Forsyth,* 472 U.S. 511, 524-30 (1985), and the defendants have appealed. An order denying a claim of immunity is not listed in Circuit Rule 50, so we do not remand for a statement of reasons in compliance with that rule, *Sims v. Lucas,* No. 92-1411 (7th Cir. Nov. 22, 1993), but we hope that district judges appreciate the need to explain themselves when entering appealable orders. See also, e.g., *In re Shell Oil Co.*, 966 F.2d 1130 (7th Cir. 1992); *DiLeo v. Ernst & Young,* 901 F.2d 624, 626 (7th Cir. 1990).

Our first step is to dismiss a large chunk of the appeal. The collateral order doctrine elaborated in *Mitchell* permits an appeal by a person seeking qualified immunity, which entails a "right not to be tried." Only five of the defendants (Ho, the three members of the grievance board, and President Lazerson) have been sued in their personal capacities. The rest have been sued in their official capacities only, to facilitate prospective relief should the district court conclude that Feldman is entitled to reinstatement. The complaint is explicit that only five defen-

dants face personal liability. *Cannon v. University of Health Sciences,* 710 F.2d 351, 356 (7th Cir. 1983), holds that Southern Illinois University is a state agency, so the eleventh amendment (more accurately, the doctrine of *Hans v. Louisiana,* 134 U.S. 1(1890)) bars an award of damages against the University itself. Because an official-capacity suit is effectively one against the institution, the official-capacity defendants share the University's imperviousness to damages. *Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985); *Lassiter v. Alabama A&M University,* 3 F.3d 1482, 148485 (llth Cir. 1993). These defendants therefore are not at personal risk. They do not need qualified immunity, and for that matter are not entitled to claim it. *Owen v. Independence,* 445 U.S. 622 (1980) (governmental bodies are not entitled to qualified immunity from damages). *Mitchell* does not permit them to appeal from the denial of a motion they did not need to make in the first place, and their appeal is dismissed for want of jurisdiction.

Chairman Ho, President Lazerson, and the three members of the grievance board are entitled to appeal. Feldman contends that they are not entitled to immunity, because the principle that public employers may not retaliate for speech on a subject of public concern long predated their action. See *Pickering v. Board of Education,* 391 U.S. 563 (1968); *Connick v. Meyers,* 461 U.S. 138 (1983); *Rankin v. McPherson,* 483 U.S. 378 (1987) and similar cases. Defendants reply that no case has ever characterized, as a subject of public concern, one employee's accusations of another's misconduct, made wholly within an employer's administrative structure. They contend that the right Feldman asserted therefore has not been established with the necessary specificity. See *Anderson v. Creighton,* 483 U.S. 635 (1987); *Rakovich v. Wade,* 850 F.2d 1180. 1207-14 (7th Cir. 1988) (en banc); *Greenberg v. Kmetko,* 840 F.2d 467 472-75 (7th Cir. 1988) (en banc).

The principle that a public employee may not be discharged or disciplined for speech protected by the first amendment is qualified. *Pickering* announced that courts must strike a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. Cases since *Pickering* have emphasized that "[t]his balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment.... [P]ublic employers are *employers,* concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Rankin,* 483 U.S. at 384 (emphasis in original).

Teachers are acutely aware of both sides of the balance. They speak and write for a living and are eager to protect both public and private interests in freedom to stake out controversial positions. Yet they also *evaluate* speech for a living and are eager to protect both public and private interests in the ability to judge the speech of others and react adversely to some. They grade their students' papers and performance in class. They edit journals, which reject scholarly papers of poor quality. They evaluate their colleagues' academic writing, and they deny continuing employment to professors whose speech does not meet their institution's standards of quality. See *Weinstein v. University of Illinois,* 811 F.2d 1091 (7th Cir. 1987). "The government" as an abstraction could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, but a Department of Political Science can and should show such a person the door—and a public university may sack a professor of chemistry who insists on instructing his students in moral philosophy or publishes only romance novels. Every university evaluates *and acts* on the basis of speech by

members of the faculty; indeed, Feldman proposed that Ho do just this on the basis of his colleague's speech. Lack of originality is a standard reason for denying tenure; Feldman accused his colleague of an extreme version of this defect. Feldman therefore does not deny that speech in a university may be the basis of adverse action; he believes, rather, that the penalty should have fallen on the accused colleague rather than himself. Yet an unsupported charge of plagiarism reflects poorly on the accuser; the first amendment does not ensure that a faculty member whose assessment of a colleague's work reveals bad judgment will escape the consequences of that revelation.

"Under the first amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974); but cf. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-18 (1990). Points of view, neither true nor false, struggle for acceptance. There is most certainly such a thing as a false charge of plagiarism, however. If Feldman is right, his colleague committed a grave error, perhaps the crime of copyright infringement. If Feldman is wrong, then he has committed the tort of slander. No one these days believes that penalizing defamation violates the first amendment. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). There are special rules when the target is a public figure (Feldman's colleague is not), and the Constitution limits presumptive or punitive damages, but our case does not involve these principles. There is no "clearly established" right—there is no right, period—to defame a fellow member of the faculty. "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). Defendants therefore are entitled to immunity, if not to judgment on the whole first amendment aspect of the case. Cf. *Siegert v. Gilley*, 111 S. Ct. 1789 (1991). Whether Feldman *did* defame his colleague is a matter for the University to work out as an original matter, and then perhaps for a court hearing an action under state law. Feldman believes that the University did not investigate his charge properly and that Ho

leapt to the colleague's defense rather than keeping an open mind. That may or may not be true, but a university's careless handling of a charge of intellectual dishonesty does not convert an ordinary dispute under the law of torts, or contracts, or the administrative procedures of a public employer, into a violation of the first amendment.

One could recast this in the language of balancing. On receiving a charge of intellectual dishonesty, a university should investigate. Interests weigh on the side of the speaker, on the side of the target, and on the side of the educational mission. If the charge is correct, the plagiarist should be disciplined; if the charge is unfounded, the accuser should be disciplined; if there is some basis for the charge, but the university believes that the accusation is unproven, then no one should be disciplined—for a university does not wish to discourage candid discourse about the quality of work being performed by the faculty. Which of these three outcomes is appropriate depends not on whether plagiarism is a "matter of public concern", *Pickering,* 391 U.S. at 568, but on the truth of the accusation and the care the accuser took before making it. There are no categorical answers, only a process of investigation and deliberation leading to a disposition one case at a time. This suggests the lack of any clear constitutional right. As we have held repeatedly, the complexity of *Pickering's* balancing approach makes damages too crude an instrument As a result, "qualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required." *Benson v. Allphin,* 786 F.2d 268, 276 (7th Cir. 1986). For similar sentiments in other public employment cases, see *Walsh v. Ward, 991* F.2d 1344, 1346 (7th Cir. 1993); *Greenberg v. Kmetko,* 922 F.2d 382, 384-85 (7th Cir. 1991).

The district court should have dismissed the claim for damages under the first amendment. Whether Feldman has a claim for prospective relief, or for damages under state law, remains

open in the district court. The appeal is dismissed to the extent we have indicated. On the appeal of the five defendants sued in their personal capacities, the judgment is reversed, and the case is remanded for proceedings consistent with this opinion.

FLAUM, *Circuit Judge*, concurring in part and dissenting in part. I concur in the decision to dismiss the appeals of those defendants sued only in their official capacity, but I am only in partial agreement with the majority's disposition of the qualified immunity appeals that are properly before us. I agree with the majority that when presented with an accusation of intellectual dishonesty by one faculty member against another, officials of a public university should be afforded wide latitude in evaluating and acting upon that accusation. Even though acts of academic fraud financed by public monies are matters of clear concern not only to users of the state university system but to all taxpaying citizens, a university cannot function as a credible employer or academic institution without the ability to discipline members of its staff who irresponsibly impugn the integrity of the school or its faculty. Thus, the outcome of a *Pickering* balance is not foreordained when a university responds to a charge of plagiarism with disciplinary action against the accuser after some process of deliberation and investigation. Even when a university's handling of the charge appears careless from a later vantage point, I agree that the balance of speech and employer interests usually will not be so obviously lopsided that responsible officials acting in good faith should forfeit their immunity from personal liability.

If, however, school officials punish an accuser not because of any judgment about the falsity, recklessness or unsupported nature of his charges but simply because they dislike the practice of questioning the work of their colleagues, regardless of the truth or manner of the charge, then I see no legitimate competing interests that could even begin to counterbalance the plain interest the public has in that kind of information being brought

to light. It is not surprising that members of a faculty, moved by a profession's instinct for self-preservation, may prefer to close ranks and stifle self-examination than to address the merits of a challenge to the integrity of one of their own. But I think it is evident that a parochial interest in chilling scrutiny of state university professors' scholarly standards is not a valid basis for punishing speech in a public setting, and thus, a university official who fires a school employee solely on such a ground should not enjoy the shelter of official immunity.

I am not at all convinced that this type of speech suppression occurred at Southern Illinois University. However, the qualified immunity defense was raised here on a motion to dismiss whose denial we are now reviewing. As a result, we must take as true the allegations of the complaint and construe them liberally in plaintiff's favor. Our legal conclusions cannot be based on alternate scenarios of this affair that the University may paint once given the chance. (This is why qualified immunity is better raised on summary judgment than on a 12(b)(6) motion, *see McMath v. Gary, Indiana*, 976 F.2d 1026, 1031 (7th Cir. 1992).) Looking at the complaint, I find it adequately alleges that defendants Ho's and Bahn's actions were motivated by a personal distaste for the kind of speech Feldman was uttering unconnected to valid institutional concerns.[1] Thus, at this stage in the litigation, I would decline to accord them immunity from damages.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[1] Chung Wu Ho was the chairman of the mathematics department and Art Bahn was a member of the grievance committee reviewing the decision to terminate Feldman.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 92-442-JPG

MARCUS B. FELDMAN,
Plaintiff,

v.

ART BAHN, et al.,
Defendants.

ORDER

[Filed: Jan. 11, 1993]

GILBERT, District Judge:

Pending before this Court is defendants Motion to Dismiss (Doc. No. 8). For purposes of defendant's motion, all well-pleaded allegations of the complaint must be taken as true. *Wolfolk v. Rivera*, 729 F.2d 1114, 1116 (7th Cir. 1984). The test to be applied on a motion to dismiss is whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A plaintiff need not set out in detail the facts upon which a claim is based, but must allege sufficient facts to outline the cause of action. *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985).

The Court hereby holds that as to Lawrence Brown and the members of the Southern Illinois University Board of Trustees, these defendants cannot be sued in their individual capacity and that according to the plaintiff's complaint, these defendants are only being sued in their official capacity.

As to defendant Earl Lazerson, the Court is reserving ruling on the issue of whether he had sufficient personal involvement to

sustain a case under § 1983 until further discovery is completed. However, if in discovery it appears that Lazerson did not have sufficient personal involvement then the Court will later grant this portion of the motion.

As to the remainder of the claims the Court holds that the plaintiff's pleading are sufficient to state a cause of action. Regarding the issues of law raised in defendant's motion and in oral arguments, specifically as it applies to the issues of public concern and balancing of interest, this Court feels that plaintiff's complaint has alleged sufficient facts to prevent the granting of defendant's Motion to Dismiss. After additional discovery these issues may be more properly addressed in future motions. The Motion to Dismiss (Doc. No. 8) is therefore **DENIED**:

IT IS SO ORDERED.

DATED: January 11, 1993.

/s/ J. Phil Gilbert
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 92-442-JPG

MARCUS B. FELDMAN,
Plaintiff,

v.

ART BAHN, et al.,
Defendants.

ORDER

[Filed: Mar. 10, 1993]

GILBERT, District Judge:

Pending before this Court is defendants' Motion to Reconsider (Document No. 21). The Court hereby **GRANTS** this motion and accordingly enters the attached amended order.

IT IS SO ORDERED

DATED: MARCH 10, 1993

/s/ J. Phil Gilbert
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 92-442-JPG

MARCUS B. FELDMAN,
Plaintiff,

v.

ART BAHN, et al.,
Defendants.

AMENDED ORDER

[Filed: Mar. 10, 1993]

GILBERT, District Judge:

Pending before this Court is defendants Motion to Dismiss (Doc. No. 8). For purposes of defendant's motion, all well-pleaded allegations of the complaint must be taken as true. *Wolfolk v. Rivera,* 729 F.2d 1114, 1116 (7th Cir. 1984). The test to be applied on a motion to dismiss is whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). A plaintiff need not set out in detail the facts upon which a claim is based, but must allege sufficient facts to outline the cause of action. *Ellsworth v. City of Racine,* 774 F.2d 182, 184 (7th Cir. 1985).

The Court hereby holds that as to Lawrence Brown and the members of the Southern Illinois University Board of Trustees, these defendants cannot be sued in their individual capacity and that according to the plaintiff's complaint, these defendants are only being sued in their official capacity.

As to defendant Earl Lazerson, the Court is reserving ruling on the issue of whether he had sufficient personal involvement to sustain a case under § 1983 until further discovery is completed. However, if in discovery it appears that Lazerson did not have

sufficient personal involvement then the Court will later grant this portion of the motion.

As to the remainder of the claims, including the claim that Defendants Bahn, Lawrence and Bengston are entitled to qualified immunity, the Court holds that the Plaintiff's pleadings are sufficient to state a cause of action and these Defendants are not entitled to qualified immunity on the facts pled. Regarding the issues of law raised in defendant's motion and in oral arguments, specifically as it applies to the issues of public concern and balancing of interest, this Court feels that plaintiff's complaint has alleged sufficient facts to prevent the granting of defendant's Motion to Dismiss. After additional discovery these issues may be more properly addressed in future motions. The Motion to Dismiss (Doc. No. 8) is therefore **DENIED**:

IT IS SO ORDERED.

DATED: March 10, 1993.

/s/ J. Phil Gilbert
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 9, 1994

No. 93-1908

MARCUS B. FELDMAN,
Plaintiff-Appellee,

v.

ART BAHN, *et al.*,
Defendants-Appellants.

Before

Hon. Harlington Wood, Jr. Circuit Judge

Hon. Joe M. Flaum, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Appeal from the United States District Court
for the Southern District of Illinois,
East St. Louis Division

No. 92-442-JPG
J. Phil Gilbert, Chief Judge.

ORDER

Plaintiff-Appellee filed a petition for rehearing and suggestion of rehearing en banc on January 12, 1994. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

Cause No. 92-442-WDS

MARCUS B. FELDMAN,
Plaintiff,

v.

ART BAHN, et al.,
Defendants.

AMENDED COMPLAINT

In support of his claims against the Defendants, Plaintiff Marcus B. Feldman states:

JURISDICTION AND VENUE

1. Plaintiff brings this action under 42 U.S.C. §§1983 and 1988 to remedy violation by Defendants of his right of free speech protected by the First Amendment and Fourteenth Amendment to the Constitution of the United States.

2. Plaintiff invokes the jurisdiction of this Court under 42 U.S.C. §1983, 42 U.S.C. §1988 and 28 U.S.C. §1343.

PARTIES

3. From September 1986 to June 1990, Plaintiff was Assistant Professor in the Department of Mathematics and Statistics at Southern Illinois University at Edwardsville ("SIUE"), in a tenure-track position with a continuing contract. SIUE is an agency of the State of Illinois.

4. SIUE, through its Board of Trustees, Chancellor, President and faculty members who serve as members of grievance panels, maintains a Faculty Grievance Procedure, the intended

purpose of which is to assure that SIUE will act responsibly toward each member of the faculty. Under this procedure a Hearing Committee is appointed to hear the grievance and facts related to its proper disposition and make findings of fact and a recommended ruling to the University's President, who must either accept the decision of the Committee or provide a written justification to the grievant, respondent and members of the Hearing Committee. In this regard, these defendants are all "administrators" charged with protecting the academic careers of those who have in good faith reported possible fraud or misconduct in scholarship or research under the University's Policy on Academic Integrity which is set forth, in part, in paragraph 12 of this Amended Complaint.

5. From September 1990 to July 1991, Defendants Art Bahn, Edwin Lawrence, and Harlan Bengtson were tenured members of the faculty of SIUE and the members of Grievance Panel charged, under the Faculty Grievance Procedures (hence, under color of state law), with hearing, reporting their finding of facts and making a recommended ruling to SIUE's President on the grievance Plaintiff filed in July of 1990 grieving his being given a terminal contract, and charged, under SIUE's Policy on Academic Integrity, with protecting the academic careers of persons who have in good faith reported possible fraud or misconduct in scholarship or research.

6. From July l, 1988 to the present, Defendant Ho has been Chair of the Department of Mathematics and Statistics at SIUE, charged, under SIUE's Policy on Academic Integrity, hence, under color of state law, with protecting the academic careers of persons who have in good faith reported possible fraud or misconduct in scholarship or research.

7. From 1988 to the present, David Werner was Provost and Vice President of Academic Affairs at SIUE charged, under SIUE's Policy on Academic Integrity, hence, under color of state

law, with protecting the academic careers of persons who have in good faith reported possible fraud or misconduct in scholarship or research. In this capacity, he is responsible for overseeing the process by which all significant decisions affecting all faculty personnel are made.

8. From September 1986 to the present, Defendant Lazerson was President of SIUE charged, under the Faculty Grievance Procedures (hence, under color of state law), with accepting or not accepting the recommendation of the Hearing Committee described in paragraph 5 and charged, under SIUE's Policy on Academic Integrity, with protecting the academic careers of persons who have in good faith reported possible fraud or misconduct in scholarship or research.

9. From July 1991 to the present, Defendant Brown was Chancellor of Southern Illinois University, charged, under color of state law, with recommending to the Board of Trustees of Southern Illinois University that they grant or deny appeals of decisions of the President on faculty grievances and with protecting the academic careers of persons who have in good faith reported possible fraud or misconduct in scholarship or research.

10. The Members of the Board of Trustees of Southern Illinois University have the power to be sued under Ill.Rev.Stat. Ch. 144, paragraph 657 and are charged under color of state law with granting or denying faculty grievances and with protecting the academic careers of persons who have in good faith reported possible fraud or misconduct in scholarship or research.

11. Under the Bylaws of the Board of Trustees of Southern Illinois University of which the University is a part, "the Board of Trustees is responsible to the people of the State of Illinois for the orderly functioning of the administrative units under its jurisdiction." These Bylaws provide for review of administrative actions. It is the policy of the Board of Trustees (stated at Article VI, Section 2A) to review "those administrative deci-

sions . . . which raise serious questions regarding the integrity of the decision-making process, or which involve the termination of employment . . ."

CLAIM

12. The University's Policy on Academic Integrity provides in part:

> "Any member of the University community who becomes aware of an apparent instance of breach of professional standards of competence and responsibility relating to research or scholarship has the responsibility to try to resolve the issue, if possible, in consultation with those directly involved. If consultation is inappropriate or unsuccessful, it is incumbent upon the individual to report the circumstances to the unit executive officers (i.e., head of the department or comparable administrator an the school dean) of the unit concerned, or to the Dean of Graduate Studies and Research. The unit executive officers, deans, other administrators involved and the entire community, are charged with protecting the academic careers of persons who have in good faith reported possible fraud or misconduct in scholarship or research."

This policy also provides that the academic community should give particular attention to the academic integrity of the tenure candidates.

13. Ill.Rev.Stat. Ch. 144, paragraph 219 provides on the subject of Illinois state policy on academic papers:

> The assisting or promoting of plagiarism in institutions of higher education is declared to be against the public policy of this State.

14. In 1980, Plaintiff left a full-time position as an engineer with McDonnell Douglas Corporation to begin a full-time Ph.D.

program in Mathematics at Washington University because of his desire to spend the rest of his working life doing research in and teaching in a university, even though it meant that he would make less money over the course of his life.

15. In the spring of 1989, Plaintiff, acting in good faith and consistent with the University's Policy on Academic Integrity brought to the attention of Defendant Ho his (Plaintiff Feldman's) concerns about possible fraud or misconduct of a colleague, Dr. Ledzewicz-Kowalewska in her research, as he believed the upcoming tenure vote on her made it incumbent upon him to do so.

16. Before the activity outlined in paragraph 15, Defendant Ho had told Plaintiff that he (Ho) saw no reason why Plaintiff's contract would not be normally continued until Plaintiff came up for consideration for tenure; had recommended Plaintiff's appointment to important positions of responsibility in the Department; had written a favorable evaluation of Plaintiff's teaching; and had evaluated Plaintiff's teaching, research, service and other aspects of Plaintiff's contractual duties as at least "satisfactory," if not better.

17. Shortly after the activities outlined in paragraph 15, Dr. Kowalewska asked Dr. Ho to be "harder" on Plaintiff because of the activities outlined in paragraph 15.

18. Shortly after this, Dr. Ho told Dr. Kowalewska in his office: "If anyone goes up against you [for tenure], I will chew them with nails."

19. At a meeting of the Promotion and Tenure Committee of the Department of Mathematics and Statistics in April of 1989, within two weeks of the events described in paragraph 18, Defendant Ho, referring to Plaintiff, stated to the other members that his "integrity was being questioned" by a member of the Department with respect to the issue of Dr. Kowalewska's promotion to a tenured position. At a subsequent meeting of that

Committee in December of 1989, Defendant Ho expressed concern about other statements Plaintiff had made. It was at this meeting that the subject of a terminal contract for Plaintiff was first raised.

20. Following the April of 1989 meeting, and as a consequence of Plaintiff's activities outlined in paragraph 15, Defendant Ho, acting in his individual and official capacities and under color of state law, expressed annoyance at and criticized protected speech by Plaintiff. Nonetheless, on two subsequent occasions three and seven months later, Defendant Ho again told Plaintiff that Plaintiff's continuing contract would continue normally until he was up for a tenure vote.

21. Following, and as a consequence of, Plaintiff's raising questions about Dr. Kowalewska's possible fraud or misconduct and other protected speech relating to Plaintiff's job, Defendant Ho, acting in his official and individual capacities and under color of state law, expressed, to other faculty members and other internationally distinguished mathematicians from other academic institutions, his anger about Plaintiff's speech and engaged in other activities with the intent and effect of persuading members of the Promotion and Tenure Committee to vote in favor of giving Plaintiff a terminal contract. Defendant Ho then recommended this to the Dean of the College of Arts and Sciences, Donal Myer (now deceased).

22. Dean Myer instructed Dr. Ho that under written policies of SIUE, he (Defendant Ho) should have first conferred with all tenured faculty in the Department. Dr. Ho subsequently called a meeting of all tenured faculty, showed them his written recommendation, and asked their opinion, but provided no documentation about Plaintiff's performance as a faculty member. As a consequence of Defendant Ho's conduct, SIUE placed Plaintiff on a terminal contract for the academic year 1990-1991 and terminated Plaintiff's employment effective June 15, 1991.

23. While Plaintiff's contract was under consideration Mary Cooper, a tenured full professor in the Department of Mathematics and Statistics, sent a memorandum to Provost Werner and Defendant Ho advising him of her concerns that Plaintiff was being evaluated unfairly because of his protected speech. Provost Vernon did not correct the problem though he had the authority to do so.

24. The conduct of Defendant Ho violated SIUE's Policy on Academic Integrity and Plaintiff's right to free speech protected by the First and Fourteenth Amendments to the Constitution of the United States, which right Defendant Ho knew of or reasonably should have known of. But for the activities described in paragraph 15, Plaintiff, too, would have made tenure.

25. From the founding of SIUE to the present, the Department of Mathematics and Statistics has recommended every one of its members for renewal or tenure, except Plaintiff.

26. On July 2, 1990, Plaintiff filed a grievance under SIUE's Faculty Grievance Procedure grieving his being given a terminal contract.

27. From December 12, 1990 to March 6, 1991, Defendants Bahn, Lawrence and Bengston, acting in their individual and official capacities, heard the evidence on Plaintiff's grievance, including the evidence of his reporting possible fraud or misconduct in his colleague's scholarship or research to the attention of Defendant Ho and Dean Myer.

28. At the beginning of the hearing of Plaintiff's grievance, Plaintiff made an opening statement to panel members Bahn, Lawrence and Bengston in which he stated that one of the three issues before the panel was whether his constitutionally protected right of free speech had been violated. During the hearing on Plaintiff's grievance, Defendant Ho conceded that he was not familiar with Plaintiff's teaching in approximately the last two years of his employment at the University.

29. In questioning Plaintiff at the hearing on his grievance and in recommending against the granting of Plaintiff's grievance, the members of the Grievance Panel (Defendants Bahn, Lawrence and Bengston), acting in their individual and official capacities and under color of state law, faulted Plaintiff for raising his concerns about a colleague's possible fraud or misconduct in her scholarship or research, notwithstanding that they knew that his speech was protected by the U.S. Constitution. They characterized the conduct as "quixotic" and instructed Plaintiff that as he had raised these questions, he, not Dr. Ho, was obliged to prove that Dr. Kowalewska had engaged in academic misconduct.

30. During the period of time the hearing was being held, Defendant Bahn told Plaintiff: (1) that he (Bahn) knew what Defendant Ho was doing was unethical; (2) that the mistake Plaintiff had made with respect to his colleague was not to wait until he had tenure to raise questions about the colleague's possible fraud or misconduct; but (3) that the panel would rule against Plaintiff anyway.

31. The members of Plaintiff's Grievance Panel (Defendants Bahn, Lawrence and Bengston), acting under color of state law and in their individual and official capacities, recommended that Dr. Ho's decision stand because Plaintiff had in good faith reported possible fraud or misconduct in a colleague's scholarship or research, which Defendant Bahn referred to as "digging dirt on a colleague" and submitted incomplete and intentionally distorted findings of fact to Defendant Lazerson.

32. In denying Plaintiff's grievance, Defendant Lazerson, having requested and received an extension of time to consider Plaintiff's case, acted under color of state law and in his official and individual capacities, undermined SIUE's Policy on Academic Integrity and caused the termination of Plaintiff's employment in violation of his constitutionally protected right of

free speech, which right Defendant Lazerson knew of or reasonably should have known of.

33. In concurring with President Lazerson's decision on Plaintiff's grievance, Defendant Brown, acting in his official capacity as Chancellor and under color of state law, affirmed the termination of Plaintiff's employment, in violation of Plaintiff's constitutionally protected right of free speech.

34. In denying Plaintiff's appeal as a matter of course, despite an attempt by their student member to permit Plaintiff to draw their attention to the public policy dimensions of that appeal and despite Plaintiff's distributing a written statement to each of the Members of the Board of Trustees, acting in their official capacities and under color of state law, failed to uphold SIUE's policy on academic integrity and denied Plaintiff his constitutionally protected right of free speech.

35. Defendant Ho's asserted reasons for giving Plaintiff a terminal contract (negative student evaluations, hence, poor teaching, inadequate service and non-collegiality adversely affecting the operations of the Department), were pretexts in that: student evaluations on many faculty members in the Department were worse than those on Plaintiff, most evaluations of Plaintiff were favorable, and some faculty members have discarded critical student evaluations at times at the suggestion of members of the Administration of SIUE; Plaintiff's service was greater than that of most of the faculty in the Department; and the only evidence presented to show Plaintiff's interfering with Department operations was Dr. Ho's testimony that Dr. Kowalewska could not fairly review Plaintiff, and current Dean David Steinberg's testimony that due to Plaintiff's having followed faculty grievance procedures the members of the Promotion and Tenure Committee could be unfair to Plaintiff in the future.

36. As a consequence of the conduct of Defendants Ho, Bahn, Lawrence, Bengston and Lazerson, Plaintiff has suffered

severe prolonged humiliation and emotional distress which has required Plaintiff to seek treatment from a psychiatrist and ongoing treatment from a therapist.

37. As a consequence of the conduct of all Defendants, Plaintiff has suffered loss of professional reputation among his former colleagues and students at SIUE and in the international community of academic mathematicians and loss of the enjoyment of academic life and the opportunity to continue his research, teaching and professional discourse with colleagues.

38. Plaintiff was unemployed until January 13, 1991, at which point he began teaching one course at Washington University for $2,500. He has no guarantee he will teach this course again. The conduct of Defendants has caused Plaintiff to lose earnings in an amount in excess of $30,000 and will cause Plaintiff to lose earnings in excess of $100,000.

WHEREFORE, Plaintiff prays that the Court 1) enter its order requiring Defendants, in their official capacities, prospectively to reinstate Plaintiff to a tenured position in the Department of Mathematics and Statistics; 2) enter its order prohibiting the Defendants, in their official capacities and prospectively, from considering in any adverse way, Plaintiff's having in good faith reported possible fraud or misconduct by a colleague: 3) enter its order requiring Defendants Ho, Bahn, Lawrence, Bengston and Lazerson, jointly and severally, to compensate Plaintiff for his damages, including, but not limited to, lost past and future compensation, lost employment benefits, compensation for pain, suffering and emotional distress, compensation for loss of enjoyment of academic life; and 4) award Plaintiff reasonable attorneys' fees and any other legal or equitable relief which the Court may deem appropriate.

Respectfully submitted,

HARRIS, DOWELL, FISHER,
HARRIS & STALNAKER

/s/ Timothy L. Stalnaker
Timothy L. Stalnaker

/s/ George L. Lenard
George L. Lenard #06184729

15400 South Outer Forty
Suite 202
Chesterfield, Missouri 63017
(314) 532-0300

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Complaint was served this 20th day of July, 1992 by regular first class mail, postage prepaid on:

John L. Gilbert, Esq.
Reed, Armstrong, Gorman,
Coffey, Thomson & Gilbert
125 N. Buchanan
P.O. Box 247
Edwardsville, IL 62025

/s/Timothy L. Stalnaker
Timothy L. Stalnaker

6427A

No. 93-1958

Supreme Court, U.S.
FILED
JUL 1 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARCUS B. FELDMAN,

Petitioner,

v.

ART BAHN, EDWIN LAWRENCE, and HARLAN BENGTSON, Faculty Members at Southern Illinois University at Edwardsville ("SIUE") and Members of the Panel Deciding Plaintiff's Grievance, in their official and individual capacities; CHUNG-WU HO, Chair of the Department of Mathematics and Statistics and EARL LAZERSON, President, in their official and individual capacities; DAVID WERNER, Provost and Vice President of Academic Affairs; LAWRENCE BROWN, Chancellor of Southern Illinois University, and THE MEMBERS OF THE SOUTHERN ILLINOIS UNIVERSITY BOARD OF TRUSTEES, in their official capacities,

Respondents.

BRIEF OF RESPONDENTS ART BAHN, EDWIN LAWRENCE, HARLAN BENGTSON, CHUNG-WU HO AND EARL LAZERSON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN L. GILBERT
(Counsel of Record)
RODNEY W. PHILLIPE
REED, ARMSTRONG, GORMAN, COFFEY, THOMSON, GILBERT & MUDGE, P.C.
125 N. Buchanan, P.O. Box 247
Edwardsville, Illinois 62025
(618) 656-2244

Attorneys for Respondents, Art Bahn, Edwin Lawrence Harlan Bengtson, Chung-Wu Ho, and Earl Lazerson

July 1994

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QUESTION PRESENTED

Whether public university official defendants sued in their individual capacities are entitled to qualified immunity from suit when they are alleged to have retaliated against a faculty member by not renewing his probationary faculty contract for bringing to the attention of the defendants concerns about possible fraud or misconduct of a colleague in the latter's research.

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are correctly identified in the Petition for a Writ of Certiorari. In accordance with Rule 24.2 of the Rules of the Supreme Court, a list of those parties is omitted here.

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No. 93-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARCUS B. FELDMAN,

Petitioner,

v.

ART BAHN, EDWIN LAWRENCE, and HARLAN BENGTSON, Faculty Members at Southern Illinois University at Edwardsville ("SIUE") and Members of the Panel Deciding Plaintiff's Grievance, in their official and individual capacities; CHUNG-WU HO, Chair of the Department of Mathematics and Statistics and EARL LAZERSON, President, in their official and individual capacities; DAVID WERNER, Provost and Vice President of Academic Affairs; LAWRENCE BROWN, Chancellor of Southern Illinois University, and THE MEMBERS OF THE SOUTHERN ILLINOIS UNIVERSITY BOARD OF TRUSTEES, in their official capacities,

Respondents.

BRIEF OF RESPONDENTS ART BAHN, EDWIN LAWRENCE, HARLAN BENGTSON, CHUNG-WU HO AND EARL LAZERSON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions, orders, and judgments of the courts below are correctly cited or included in the Petition for a Writ of Certiorari. In accordance with Rule 24.2 of the Rules of the Supreme Court, the citations are omitted here.

JURISDICTION

The jurisdiction of the United States Supreme Court is correctly invoked as recited in the Petition for a Writ of Certiorari. In accordance with Rule 24.2 of the Rules of the Supreme Court, the statement of the grounds on which jurisdiction is invoked is omitted here.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are correctly cited in the Petition for a Writ of Certiorari. In accordance with Rule 24.2 of the Rules of the Supreme Court, the statement of constitutional provisions and statutes involved is omitted here.

STATEMENT OF THE CASE

It is necessary to supplement Petitioner's Statement of the case as follows:

Petitioner's statement of the case failed to comply with Rule 14.1(g) of the Rules of the Supreme Court because Petitioner went beyond the Rule's requirement of facts material to the consideration of the questions presented. Petitioner, by characterizing certain parts of the decision of the Court of Appeals below, presents argument regarding the decision which is not appropriate for a statement of the case. See Petition at page 5. These characterizations of the Seventh Circuit's decision reappear in Petitioner's argument where they appropriately belong and Respondents have addressed them in Respondents' argument.

Also, Rule 14 of the Rules of the Supreme Court requires that questions presented for review should be short and concise and should not be argumentative or repetitious. The questions presented by Petitioner are neither short nor concise and are

argumentative. The proper question presented is set forth in the first page of this brief.

At page 4 of Petitioner's Petition he states that: "Ho told the colleague whose research claims Feldman had questioned, that Ho would retaliate against any who went against her for tenure."

In fact, the Petitioner alleged that while Dr. Ho and the accused colleague were in Ho's office, Feldman overheard Dr. Ho tell the colleague, "If anyone goes up against you, I will chew them with nails." There is no mention of tenure or retaliation regarding tenure in the statement allegedly attributable to Ho. Petition at A-19.

Plaintiff filed a complaint on June 5, 1992 alleging that Defendants violated his First Amendment rights by failing to renew his employment contract as a non-tenured faculty member of the Mathematics Department of Southern Illinois University at Edwardsville. Plaintiff alleged that his contract was not renewed because he brought to the attention of his department chair what Plaintiff described as, "concerns about possible fraud or misconduct of a colleague in scholarship or research." Petition at A-19. From September of 1986 to June 15, 1992, Plaintiff was a non-tenured, assistant professor serving under a probationary faculty contract with the Department of Mathematics at Southern Illinois University at Edwardsville. Petition at A-15.

In the spring of 1990, the Promotion and Tenure Committee for the Southern Illinois University at Edwardsville Mathematics Department reviewed the employment of all non-tenured faculty members and recommended that Plaintiff be presented a terminal contract.

Dr. Ho complied with the Committee recommendation to terminate Feldman's contract and sent it to the Dean of the College of Arts and Sciences, Donal Myer (now deceased). Petition at A-20.

Southern Illinois University at Edwardsville maintains a faculty grievance procedure wherein a hearing committee is appointed to hear a grievance and facts related to its proper disposition, make findings of fact, and make a recommendation to the University President. Defendants Bahn, Lawrence and Bengtson submitted written recommendations to University President, Earl Lazerson, that the Promotion and Tenure Committee's decision to issue Plaintiff a terminal contract be upheld. Petition at A-21.

Under the grievance procedure, President Lazerson must either accept or reject the decision of the Grievance Hearing Committee. After receiving the grievance committee's recommendation and reviewing the record, President Lazerson denied Plaintiff's grievance and upheld the recommendation of the Promotion and Tenure Committee to issue Plaintiff a terminal contract. Petition at A-22.

Defendant James Brown, Chancellor of Southern Illinois University was charged with recommending to the Board of Trustees of Southern Illinois University that the Board grant or deny appeals of the President's decision on faculty grievances. Chancellor Brown concurred with President Lazerson's decision to affirm the termination of Plaintiff's employment and so recommended to the Board of Trustees of Southern Illinois University. Petition at A-23.

The Members of the Board of Trustees of Southern Illinois University denied Plaintiff's appeal. Petition at A-23.

On July 6, 1992, Defendants filed a Motion to Dismiss based on qualified immunity. The district court denied the motion. Petition at A-9. On January 27, 1993, Defendants filed a Motion to Reconsider the denial of the motion. On March 10, 1993, the court granted the Motion to Reconsider but again entered an order denying Defendants' Motion to Dismiss. Petition at A-11 and A-12. Defendants filed a Notice of Appeal on April 8, 1993.

Oral argument was heard on November 3, 1993. On December 29, 1993 the Seventh Circuit issued an opinion reversing the district court and granted qualified immunity to the defendants sued in their individual capacities. Petition at A-1.

Plaintiff filed a Petition for a Writ of Certiorari on June 7, 1994.

SUMMARY OF ARGUMENT

The U.S. Supreme Court should not grant Petitioner's request for a writ of certiorari.

First, the Seventh Circuit correctly decided that the Defendants sued in their individual capacities were entitled to qualified immunity. The law was *not* clearly established that what defendants are alleged to have done violated Petitioner's constitutional rights or that Petitioner's speech was speech upon matters of public concern.

Second, the Seventh Circuit's decision does not suggest issues of national importance or threaten the protection of the free exchange of ideas at academic institutions. The Court of Appeals decided only the qualified immunity issue. The issue of a constitutional violation remains open.

Third, the Seventh Circuit's decision does not conflict with *Anderson* v. *Creighton* or with other circuit court opinions. The Seventh Circuit's decision is consistent with *Anderson* and the cases cited by Petitioner as in conflict are distinguishable.

Therefore, no special or important reasons exist for this court's review on a writ of certiorari. See Rule 10 of the Rules of the U.S. Supreme Court.

ARGUMENT

I. THE DEFENDANTS SUED IN THEIR INDIVIDUAL CAPACITIES WERE ENTITLED TO QUALIFIED IMMUNITY.

Plaintiff alleged retaliation by the Defendant state university officials for the following conduct: "... brought to the attention of Defendant Ho his (Plaintiff Feldman's) concerns about possible fraud or misconduct of a colleague... in her research, as he believed the upcoming tenure vote on her made it incumbent upon him to do so."

The Seventh Circuit Court of Appeals correctly held that the Defendant university officials sued in their individual capacities were entitled to qualified immunity for their alleged roles in the nonrenewal of Feldman's probationary faculty contract, that is, Ho, in his role as department chairman, and the others in their roles as appellate decision makers. *Feldman* v. *Bahn*, 12 F.3d 730 (7th Cir. 1993).

The Seventh Circuit's decision was correct because the Defendants, even assuming that the nonrenewal decision was made because of Feldman's accusations as the Court of Appeals assumed, 12 F.3d at 731, did not, based upon the allegations of the complaint, violate clearly established rights of which the Defendants reasonably would have known. *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

Not only was Plaintiff's alleged speech not speech upon a matter of public concern, *Connick* v. *Meyers*, 461 U.S. 138 (1983) but the law regarding Plaintiff's alleged speech as protected speech was not clearly established. *Harlow*, 457 U.S. at 818 and *Anderson* v. *Creighton*, 487 U.S. 635 (1987). Further, the law regarding First Amendment liability for the allegations against the Defendants who acted in the capacity of reviewing the Plaintiff's grievance was not established at all. No case has

addressed the constitutional liability of a grievance hearing committee and the president of a university in their roles of hearing, reporting on, and reviewing a decision not to renew a probationary faculty contract.

The individually sued Defendants, even based upon the allegations of the complaint, could not have know that their conduct violated Plaintiff's constitutional rights, even if ultimately a court or jury determines that it did. *Anderson*, 483 U.S. at 638-639.

Therefore, while the Seventh Circuit opinion may not have been structured along traditional analytical lines for a qualified immunity review, the result was correct and does not call for U.S. Supreme Court review.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT IMPLICATE ISSUES OF NATIONAL IMPORTANCE OR POSE A THREAT TO THE FREE EXCHANGE OF IDEAS AT ACADEMIC INSTITUTIONS.

The only effect of the Court of Appeals decision was to grant correctly qualified immunity in one case to five university officials sued in their individual capacities for alleged First Amendment violations. The decision hardly implicates a question of national importance. The decision has no impact beyond the case itself because it only decided the question of qualified immunity.

Contrary to Plaintiff's overstatement of the impact of the decision, the substantive question of First Amendment liability was not decided. The district judge or a jury remains free to decide whether Plaintiff's First Amendment rights were violated by Defendants' conduct.

Contrary to Plaintiff's assertion in his petition, the Court of Appeals did not decide that public university officials cannot be

held liable for terminating a faculty member solely because of the faculty member's good faith questioning of the legitimacy of a colleague's research claims. Petition at page 7.

First, even a cursory reading of the Seventh Circuit's opinion demonstrates that the court only decided the qualified immunity question, not the question of whether Plaintiff's First Amendment rights were violated and appropriate relief therefor. Second, the court's opinion does not foreclose the possibility that Defendants may be held liable in their official capacities and appropriate relief accorded to Plaintiff on that basis. Third, Plaintiff overstates the importance of his case in his petition wherein he suggests that protection for whistleblowers is denied by the Seventh Circuit's decision. That is simply not the case. As stated, Plaintiff has not been and will not be denied relief if he prevails. He will only be foreclosed from money damages. Also, Plaintiff appears to assume that he is a whistleblower entitled to protection and that this case implicates such concerns. Plaintiff's assumption presumes the truth of Plaintiff's allegations against his colleague — an assertion which even Plaintiff does not allege. See Plaintiff's amended complaint at Petition A-15 to A-25.

Further, Plaintiff's argument in his petition assumes facts which are not supported by the record and suggests that the court review the Seventh Circuit decision on that basis. Plaintiff alleged that whistleblowers are usually retaliated against. Petition at page 8. No evidence supports this assertion even if Plaintiff can properly claim whistleblower status. The Seventh Circuit thought otherwise. 12 F.3d at 733.

Plaintiff also asserts that the court should grant review to clarify whether when public officials have terminated faculty members for speech that the officials must present evidence that they actually balanced competing interests before they can be granted qualified immunity. This assertion is without legal

support. First, the question Plaintiff presents is not the question asked in a qualified immunity analysis. The question presented by Plaintiff is better addressed after trial because Plaintiff's question presumes Plaintiff was terminated for his speech and that his speech was protected. Neither of those propositions has been established and the Seventh Circuit correctly rejected the latter for qualified immunity purposes.

Again, Plaintiff overstates his case. Public officials do risk personal liability in cases in which they retaliate for the exercise of First Amendment rights when those rights are clearly established. Protection exists under the law. Plaintiffs who are subject to violation of their clearly established First Amendment rights have available to them the full measure of legal relief. In fact, even those Plaintiffs who prove First Amendment violations against defendants who have been granted qualified immunity still have relief available, i.e. prospective injunctive relief.

Thus, the serious national implications Plaintiff perceives to justify review by the U.S. Supreme Court do not exist. The case as presented by Plaintiff does not suggest special and important reasons for U.S. Supreme Court review.

Similarly, the Plaintiff's argument that the Seventh Circuit's decision conflicts in principle with twenty-five years of Supreme Court protection of the free exchange of ideas at academic institutions is unsupported. The Seventh Circuit did not freely grant qualified immunity to university officials. The Seventh Circuit took the allegations of the complaint as true and determined that the five Defendants sued in their individual capacities were entitled to qualified immunity and, in substance, determined that as presented in the complaint the alleged conduct of Defendants did not violate a clearly established right of which the Defendants should have known. 12 F.3d at 731, 733. This hardly conflicts with twenty-five years of Supreme Court decisions "heralding and protecting the free exchange of ideas at academic institutions." Petition at page 11.

Plaintiff's complaint does not implicate the free exchange of ideas at academic institutions. Plaintiff's complaint merely alleges that he brought concerns about possible fraud or misconduct of a colleague in her research within the context of an upcoming tenure vote on the colleague. This allegation hardly implicates the free exchange of ideas at academic institutions. In fact, the complaint indicates no issue of a threat to the free exchange of ideas at any academic institution. Plaintiff acknowledges this in his petition at page 12 where he clearly states the cases cited there address the scope of the right to free speech not qualified immunity. The protection of free exchange of ideas at academic institutions is not at risk because of the Seventh Circuit's opinion in this case. Plaintiff remains free to prove a First Amendment violation and obtain relief therefor. All the Seventh Circuit Court of Appeals decision effected was qualified immunity for five defendants sued in their individual capacities. As the Seventh Circuit recognized, "There is no 'clearly established' right - there is no right, period - to defame a fellow member of the faculty." 12 F.3d 733.

No reasonable construction of the Seventh Circuit's opinion could lead anyone to conclude that the Seventh Circuit's decision conflicts with this court's decisions protecting the free exchange of ideas at academic institutions.

III. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *ANDERSON V. CREIGHTON* OR WITH OTHER CIRCUIT COURT OPINIONS.

Plaintiff states that the Seventh Circuit's opinion conflicts with *Anderson* v. *Creighton*, 483 U.S. 635 (1987), by establishing a rule granting immunity to university officials without an objective fact specific analysis. Plaintiff accuses the Seventh Circuit of reasoning from the premise that free speech balancing is a complicated process which university officials always carry out, to the conclusion that because these issues inherently involve balancing the law cannot be clearly established and,

therefore, immunity should be granted. While university officials who make difficult and risky employment decisions everyday would be thrilled with such a rule, Respondents suggest that Plaintiff misapprehends the Seventh Circuit's decision.

While the Seventh Circuit could well have reasoned, and still have been within a principled qualified immunity analysis, that University officials will appropriately balance competing interests, the court instead assumed that the recommendation not to renew Plaintiff's probationary faculty contract was because of his accusations rather than his scholarship and teaching. 12 F.3d at 731. This wipes away the argument that the court did not make a fact specific analysis based upon Plaintiff's complaint.

Plaintiff's argument that the Seventh Circuit relied on an *a priori* assumption that university officials will balance interests in a speech case and, therefore, a review of the facts of the case is not necessary, does not accurately present the approach taken by the Seventh Circuit and, therefore, does not serve as a basis to justify Supreme Court review.

While the Seventh Circuit did not undertake a traditional analysis of qualified immunity, i.e. determining whether the law was clearly established at the time that Plaintiff's speech was speech upon a matter of public concern, the court did acknowledge Plaintiff's and Defendants' arguments as the parties presented them in a qualified immunity context. 12 F.3d at 732. The court further held there was no clearly established right to make accusations against a fellow member of the faculty and that in its review of all the questions raised by the complaint, determined there were no categorical answers. The court's language correctly reflects its view that as presented in his complaint, Plaintiff alleged facts which did not establish the violation of a clearly established constitutional right of which the individually sued Defendants would have known and that qualified immunity was appropriate.

The court also suggested that assuming Defendants took into account Plaintiff's speech, which is an assumption favorable to Plaintiff, the balancing approach required by *Pickering* [*Pickering* v. *Board of Education*, 391 U.S. 563 (1968)] in a case like this one justified immunizing the Defendants. 12 F.3d at 733, 734. The court correctly determined that based upon the issues raised by the Complainant's complaint, qualified immunity was essential.

In support of Respondents' arguments, the Supreme Court has recently recognized that government employment decisions do not implicate the same level of concern regarding First Amendment expression as actions of the government as sovereign. In *Waters v. Churchill*, ___ U.S. ___, 62 LW 4397 (92-1450) decided May 31, 1994, this Court recognized that government as an employer has broader powers than government as sovereign. 62 LW 4400. The court made clear that the government has greater power as an employer in the First Amendment arena than it has as sovereign because in the latter case the government is a regulator and in the former case the government is merely an employer. As the court pointed out, the extra power the government has in the First Amendment arena with regard to employment comes from the nature of the government's mission as an employer versus its role as a governmental authority in a free society which demands greater restriction.

To be sure, *Waters* dealt with a different issue than is presented in the *Feldman* case. However, the *Waters* opinion serves to recognize that an employment decision made by a governmental entity, whether it is a university or any other governmental entity, does not rise to the same level of importance as a First Amendment decision in which the government acts as sovereign. Further, the test devised in *Waters* supports Judge Easterbrook's analysis in the Seventh Circuit opinion and allows for Judge Easterbrook's characterization of what the complaint revealed about what went on in the *Feldman* case. See *Waters*,

supra, 62 LW 4402. The court in *Waters* did not reach the question of qualified immunity. 62 LW 4403.

Respondents contend that Petitioner's argument that the Seventh Circuit's grant of qualified immunity in this case conflicts with the Second, Tenth and Eleventh Circuits is simply not correct and therefore should not serve as a basis for Supreme Court review in this case. First, the Petitioner cites *Dube* v. *The State University of New York*, 900 F.2d 587 (1990) in which the Second Circuit denied qualified immunity to university officials who denied tenure allegedly based upon the professor's discussion of controversial issues in the classroom. The *Feldman* case has nothing to do with the character of the First Amendment expression in *Dube*. Feldman, based upon the complaint, was not retaliated against because of the discussion of controversial topics in the classroom. Unlike *Dube*, in *Feldman*, we are not confronted with either a discussion of controversial topics in a classroom or facts from which a jury could find that defendants denied tenure and promotion in response to pressure exerted by government officials and community activists outraged by a professor's teachings. Also, Feldman's case involved nonrenewal of a probationary contract, not a tenure decision.

Petitioner suggests that the *Feldman* decision is in conflict with *Jefferies* v. *Harleston*, ___ F.3d. ___, 9 IER 686, 1994 WL 143448 (1994) in which the Second Circuit denied qualified immunity to university officials who were alleged to have deprived Jefferies of his position as department chair based upon his speech. *Jefferies* can easily be distinguished. In *Jefferies*, the speech at issue was a public address to an audience outside the affiliation with the governmental employer and involved criticism of racial and ethnic classes Jefferies perceived in the public school curriculum. Jefferies speech, which was also broadcast on television, is in no way similar to Feldman's in form, content or context.

Further, *Jefferies* was decided before *Waters* which acknowledged the difference of government as employer and government as sovereign in the context of First Amendment issues. Also, the Court of Appeals decision in *Jefferies* involved the *Pickering* balance, an issue not reached in the *Feldman* decision and the court concluded that Jefferies' speech unquestionably involved matters of public concern. Clearly, the Seventh Circuit decision in *Feldman* and the Second Circuit decision in *Jefferies* do not present a conflict between circuits which justifies Supreme Court review of the *Feldman* decision.

Finally, Plaintiff cites for the alleged Tenth Circuit conflict, *Powell* v. *Gallentine*, 992 F.2d 1088 (1993). Powell involved an allegation that Powell was discharged in retaliation for publishing allegations of grade fraud concerning a class taught by an adjunct professor in 1990 under Powell's supervision. As the court stated in the *Powell* case, the plaintiff's allegations of grade fraud which sought to bring to light actual or potential wrongdoing or breach of public trust on the part of the defendant university officials, was determined to be a matter of public concern. Such was not the subject matter of Feldman's alleged speech and, in fact, the *Powell* court does not cite any case from any jurisdiction which stood for the proposition that allegations of grade fraud were matters of public concern. The soundness of the decision of the *Powell* court must be questioned on this basis alone. However, the content and purpose of Powell's allegations were far different than those of Feldman. Feldman did not seek to bring to light actual or potential wrongdoing or breach of public trust on the part of the officials who administer the University. Instead, Feldman attacked a colleague. Also, rather than allege grade fraud, Feldman only brought concerns about possible fraud or misconduct of a colleague in her research in the context of an internal department tenure vote. The *Feldman* and *Powell* decisions hardly establish a conflict between circuits which supports Petitioner's petition for a writ of certiorari.

Although Petitioner alleges a conflict with the Eleventh Circuit, no Eleventh Circuit decision is cited in Petitioner's Petition; therefore, Respondents do not address the alleged conflict involving the Eleventh Circuit.

Finally, Respondents disagree that the cases demonstrate a strong reluctance to grant university officials qualified immunity. For example, in *Garvie* v. *Jackson*, 845 F.2d 647 (6th Cir. 1988) the court immunized university administrators in a free speech retaliation case involving criticism of faculty departmental actions. See also, *Griffen* v. *Thomas*, 929 F.2d 1210 (7th Cir. 1991) involving complaints about assignments and evaluations which were held not to be matters of public concern; and, *Dorsett* v. *Board of Trustees*, 940 F.2d 121 (5th Cir. 1991) which held that intra-faculty disputes about academic standards, assignments, equipment, and teacher recognition did not rise to the level of matters of public concern.

CONCLUSION

For the reasons set forth in this Brief, Respondents respectfully request this court deny Petitioner's petition for a writ of certiorari.

Respectfully submitted,

JOHN L. GILBERT
(Counsel of Record)

RODNEY W. PHILLIPE
Reed, Armstrong, Gorman, Coffey,
Thomson, Gilbert & Mudge, P.C.
125 North Buchanan Street
P.O. Box 247
Edwardsville, IL 62025
Phone: (618) 656-2244

Attorneys for Respondents Art Bahn, Edwin Lawrence, Harlan Bengtson, Chung-Wu Ho, and Earl Lazerson

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